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GIVING NOTICE: AN ARGUMENT FOR NOTIFICATION OF PUTATIVE PLAINTIFFS IN COMPLEX LITIGATION

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Abstract: Professor Silver advocates recognition of an inherent judicial power to send or authorize notice of pending litigation to potentially interested persons with unfiled claims. Recognizing such a judicial power is consistent with recent legal developments establishing a role for judges in expediting and managing federal litigation. Although the Federal Rules of Civil Procedure only explicitly provide for notice to potential parties in Rule 23 class action litigation, Professor Silver demonstrates that a more general judicial power to notify putative plaintiffs is consistent with the federal rules and the Constitution. She also shows that first amendment values support a judicial role in providing notice. Finally, the judiciary's role in protecting the disadvantaged, the public interest in private actions arising from mass torts and other collective actions, and the conservation of both public and private resources resulting from case consolidation, justify the federal district court's inherent power to send or authorize notice to putative plaintiffs.

I. INTRODUCTION

Improved access to the federal courts was an inevitable result of the relaxed pleading requirements and other simplified procedures of the 1938 Federal Rules of Civil Procedure. But the swell of litigation that followed precipitated a demand for reforms to stem the perceived glut.[1] Recent amendments to the Rules have incorporated managerial techniques designed to make litigation more efficient, to discourage the filing of spurious claims, and to force parties whose use of judicial process is excessive to bear the burden of their adversaries' costs and attorneys' fees.[2]

In many respects, the current Rules have failed to reconcile access and efficiency. The 1983 amendments to Rule 11, for example, while

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1. The advent of the Federal Rules, while significant, *see* Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494–95 (1986), was not the sole precipitant of the increase in federal litigation; congressional and judicial creation of new federal rights was also an important factor. *See* Yamamoto, *Efficiency's Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341, 350 (1990).

2. *See* FED. R. CIV. P. 11, 16, 26.

demanding competency and thoroughness of preparation from (primarily) plaintiffs, also discourage filing marginal claims, many of which are public law, and frequently civil rights claims.[3] Thus, what the rules give with one hand—access—they take away with another—sanctions.

Not every expansion of access, however, is incompatible with the streamlining of litigation. Although the bench and bar have devoted a great deal of energy to handling previously filed multijurisdiction, multiparty, primarily mass tort claims, they have paid comparatively little attention to facilitating the efficient disposition of unfiled, yet mature, claims.[4] Empowering federal district court judges to send or authorize notice to non-parties with such potential claims would enhance the opportunities to adjudicate all interests and rights stemming from one mass tort or act of discrimination. Neither the rules nor any statute nor any judicial authority has given federal trial court judges explicit, plenary authority to notify, or authorize notice to, potential plaintiffs of pending lawsuits. Whether such power exists at all is controversial. The Supreme Court recently addressed the issue in a suit arising under the Age Discrimination in Employment Act (ADEA).[5]

This Article analyzes the legal arguments and policies implicated in the notice question and offers a resolution endorsing such power. Part II describes the controversy over the existence of judicial power to notify putative plaintiffs of pending litigation. It also examines the issue of notice raised in opt-in class litigation[6] brought under the ADEA and the Fair Labor Standards Act (FLSA), and the Court's resolution of that issue in *Hoffmann-La Roche, Inc. v. Sperling.*[7] Part III discusses both the relevance of the Federal Rules of Civil Procedure to the analysis of the notice question, and the emerging role of federal trial judges as case managers. Parts IV and V explore the relevance of due process and Article III, respectively, to judicially sanctioned notice to putative parties. Part VI advances a first amendment approach to the notice question. Finally, Part VII confronts the ten-

3. *See* Yamamoto, *supra* note 1, at 363.

4. *See infra* notes 12–15 and accompanying text and note 141.

5. Hoffmann-La Roche, Inc. v. Sperling, 110 S. Ct. 482 (1989). The Court relied largely on the special characteristics of the ADEA class action as implied congressional sanction for judicial authorization of notice in this context. *See id.* at 486–87; *see also* text accompanying notes 48–49.

6. An "opt-in" class is one in which potential plaintiffs must affirmatively consent to join the class, in contrast with a Rule 23(b) class, in which one must affirmatively "opt-out" in order to avoid class membership. *See infra* notes 20–21.

7. 110 S. Ct. 482.

sion between the underlying assumptions of our adversary system on one hand, and public policy considerations on the other, and provides a justification for a broad interpretation of the judge's inherent power to notify potential plaintiffs of pending litigation.

II. NOTICE AND CONTEMPORARY COMPLEX LITIGATION

A. Two Short Stories of Judge-Initiated and Judge-Facilitated Notice

In 1974, a plane manufactured by McDonnell Douglas crashed near Paris, France, killing all 350 or so people on board. At least ten actions filed around the country were consolidated in the Central District of California before Judge Pierson Hall. Judge Hall informed counsel that he intended to order McDonnell Douglas to furnish him with a list of passengers and the names and addresses of their next of kin so that he could notify interested persons of the actions pending before him. McDonnell Douglas refused and sought mandamus from the Ninth Circuit Court of Appeals.[8]

In 1985, Hoffmann-La Roche laid off some 1200 workers. A number of those affected organized as R.A.D.A.R. (Roche Age Discriminatees Asking Redress) and filed an ADEA suit against Hoffmann-La Roche in federal district court. R.A.D.A.R. moved for discovery of the names and addresses of all similarly situated employees. Hoffmann-La Roche opposed the discovery.[9]

B. Notice, the Adversary System, Justice and Expedience

Our system of jurisprudence has evolved from the traditional model of the trial court as a passive neutral, "an umpire blandly calling balls and strikes for adversaries appearing before it."[10] Perhaps we have less faith than we once had in our adversary system, and in the ability

8. *See* Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975).

9. *Sperling,* 110 S. Ct. at 485.

10. Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 620 (2d Cir. 1965), *cert. denied,* 384 U.S. 941 (1966); *see also* Chayes, *The Role of the Judge in Public Law Litigation,* 89 HARV. L. REV. 1281, 1286 (1976) ("The judge was a neutral umpire, charged with little or no responsibility for the factual aspects of the case or for shaping and organizing the litigation for trial."); Frankel, *The Adversary Judge,* 54 TEX. L. REV. 465, 468 (1976), *cited in* Schwarzer, *Managing Civil Litigation: The Trial Judge's Role,* 61 JUDICATURE 400, 402 (1978); Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice,* 1906 A.B.A. Address, *reprinted in* 35 F.R.D. 273, 281 (1964) ("[I]n America we take it as a matter of course that a judge should be a mere umpire, to pass upon objections and hold counsel to the rules of the game, and that the parties should fight out their own game in their own way without judicial interference.").

of opposing lawyers to litigate zealously on behalf of their clients, promoting, if not insuring, the emergence of Truth and Justice. The trial judge is no longer solely reactive, subject only to the initiatives and whims of counsel. Today the federal judge actively oversees the management of litigation crowding the docket.[11] Mass disasters like Bhopal and toxic torts like asbestos challenge the judicial system's ability to provide responsive remedies. The consolidation and coordination of cases by the Panel for Multidistrict Litigation,[12] the promulgation of two editions of the *Manual for Complex Litigation*,[13] numerous recent reports, recommendations and studies,[14] as well as recent legislative initiatives,[15] evidence the need to deal more effectively with the range and quantity of litigation on the federal district docket. Furthermore, inequality of skill and resources among litigants and their counsel invite judicial intervention to even the odds.

Judicially-facilitated notice to persons with ripe yet unfiled claims increases the opportunity for cost-effective consolidation and disposition of related cases. It also enhances access to the courts for those who might otherwise forgo available avenues of redress. Federal Rule

11. *See infra* text accompanying notes 76–79.

12. *See* 28 U.S.C. § 1407 (1988) (providing for multidistrict consolidation of pretrial proceedings for civil actions raising common questions of fact).

13. MANUAL FOR COMPLEX LITIGATION (1973) [hereinafter MCL]; MANUAL FOR COMPLEX LITIGATION 2D (1985) [hereinafter MCL 2D]. In fact, the original *MCL*, preceded by the HANDBOOK OF RECOMMENDED PROCEDURES FOR THE TRIAL OF PROTRACTED CASES, 25 F.R.D. 351 (1960), was revised and supplemented several times before the promulgation of the MCL 2D. *See* MCL 2D at 1–2, nn.2–3; *see also* Schwarzer, *supra* note 10, at 404 (advocating managerial approach of the MCL be adopted for general civil case management).

14. *See, e.g.*, FEDERAL COURTS STUDY COMMITTEE REPORT (April 2, 1990) [hereinafter FCSC Report]; ABA Comm'n On Mass Torts, Report to the House of Delegates (1989) (not adopted at February 1990, ABA House of Delegates meeting); COMPLEX LITIGATION PROJECT (Tent. Draft No. 2, 1990); *Discussion of Complex Litigation Project*, 1989 A.L.I. PROC. 357, 357–99 (66th Annual Mtg.); *Report on the Project on Complex Litigation*, 1987 A.L.I. PROC. 74, 74–86 (64th Annual Mtg.); ALI, REPORT: PRELIMINARY STUDY OF COMPLEX LITIGATION (Discussion Draft, Mar. 31, 1987). The Federal Courts Study Committee's report contains numerous recommendations for decreasing the workload of the federal courts; the other reports address multi-party, multi-district litigation in particular.

15. *See, e.g.*, S. 2027, 101st Cong., 2d Sess., 136 CONG. REC. S414 (Civil Justice Reform Act of 1990) (providing for statutorily-mandated case management) (revised as S. 2648, giving individual districts latitude to devise appropriate judicial management); H.R. 3406, 101st Cong., 1st Sess., 136 CONG. REC. H3116 (Multiparty, Multiforum Jurisdiction Act of 1990) (a revision of H.R. 4807, 100th Cong., 2d Sess., 134 CONG. REC. H4232 (Court Reform and Access to Justice Act of 1988) relaxing diversity requirements and facilitating consolidation of tort cases involving 25 or more claimants). None of these measures has yet become law. Congress did pass the Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089, signed into law on December 1, 1990. It implements some of the FCSC Report recommendations, *see supra* note 14, including the provisions for removal of separate and independent claims (§ 312), relaxation of supplemental jurisdiction requirements (§ 310), and changes of venue (§ 311).

of Civil Procedure 23 explicitly empowers and frequently requires[16] the court to notify absent class members.[17] But the rules do not directly address whether that same court has the power to notify putative plaintiffs of pending litigation other than that classified as a Rule 23 class action.[18] Does the judge nevertheless have such power? The question has important implications for a variety of complex litigation.[19] It has arisen frequently in cases brought under the opt-in class

16. FED. R. CIV. P. 23(c)(2) provides in part: "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort."

17. FED. R. CIV. P. 23(d) provides:

> In the conduct of actions to which this rule applies, the court may make appropriate orders . . . (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . .

18. *See* Chayes, *supra* note 10, at 1292 ("The class action is only one mechanism for presenting group interests for adjudication, and the same basic questions will arise in a number of more familiar litigating contexts.") .

Traditionally, mass torts have been deemed inappropriate for class-action treatment under Rule 23. *See* FED. R. CIV. P. 23 advisory committee's notes (1966) ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."). There is, however, a growing trend to certify mass tort litigation as Rule 23 class actions. *See, e.g., In re* A.H. Robins Co., 880 F.2d 709, 734 (4th Cir.) (upholding class certification of Dalkon Shield plaintiffs and noting that the opinion of the 1966 Advisory Committee has yielded to the growth of mass products tort claims and increasing favor of the use of Rule 23(b)(3) for such cases), *cert. denied,* 110 S. Ct. 377 (1989); *In re* School Asbestos Litig., 789 F.2d 996, 1008–11 (3d Cir.), *cert denied,* 479 U.S. 852 (1986); *In re* Agent Orange Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983). Despite this trend, some courts continue to find Rule 23 inappropriate for addressing certain mass torts. *See, e.g., In re* Northern Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982), *cert. denied,* 459 U.S. 1171 (1983). These mass tort cases would not be covered by the notice provisions of Rule 23. *See also* J. Resnik, From Cases to Litigation (draft June 5, 1990) (forthcoming in 54 LAW & CONTEMP. PROBS. — (1991)) (discussing controversy over application of Rule 23 and other aggregative techniques to mass torts).

19. *See, e.g.,* Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975) (reversing district court's decision to notify next of kin of deceased passengers); *see also* Cherner v. Transitron Elec. Corp., 201 F. Supp. 934 (D. Mass. 1962) (holding it inappropriate at preliminary stage of litigation to authorize notification to absent class members in spurious class action). There are, however, few reported decisions addressing the notice question apart from the ADEA and FLSA cases. *See infra* notes 20–21.

provisions of the FLSA[20] and ADEA.[21] Courts that have not approved such notice have offered a variety of reasons: the lack of explicit authority to do so;[22] the inappropriateness of rousing "sleeping plaintiffs;"[23] and concerns regarding overzealousness, champerty and barratry on the part of the bar.[24] Courts that have authorized

20. Section 16(b) of the FLSA was amended in 1988 to read:

> An action to recover the liability prescribed . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

29 U.S.C. § 216(b) (1988); *see, e.g.*, United States v. Cook, 795 F.2d 987, 993–94 (Fed. Cir. 1986) (allowing discovery of putative plaintiffs in FLSA action); Dolan v. Project Constr. Corp., 725 F.2d 1263, 1268–69 (10th Cir. 1984) (disallowing notice); Partlow v. Jewish Orphans' Home of Southern Cal. 645 F.2d 757, 759 (9th Cir. 1981) (allowing corrective notice only); Braunstein v. Eastern Photographic Laboratories, 600 F.2d 335, 336 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979) (allowing notice); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 864 (9th Cir. 1977) (proscribing court-sanctioned notice).

There is a consensus among the circuit courts that an action brought under the opt-in procedures of the FLSA (as well as the ADEA) is *not* a Rule 23 class action, but is governed, rather, by the rules set forth in the statute itself. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1213 (8th Cir. 1984); *Dolan*, 725 F.2d at 1267; Woods v. New York Life Ins. Co., 686 F.2d 578, 579 (7th Cir. 1982); *Partlow*, 645 F.2d at 758; LaChapelle v. Owens-Illinois, Inc., 513 F.2d 286, 288–89 (5th Cir. 1975). The Court did not address this issue in Hoffman-La Roche v. Sperling, 110 S. Ct. 482 (1989), but one might infer its agreement from its failure to discuss Rule 23. *But see* Shushan v. University of Colorado at Boulder, 132 F.R.D. 263, 267–68 (D. Colo. 1990) (concluding that after *Sperling*, courts should use procedures embodied in Rule 23 for ADEA actions because they "are designed to promote effective management, prevent potential abuse, and protect the rights of all parties").

There is some dispute as to whether an opt-in class action is a class action at all, or rather a permissive joinder. *Compare, e.g.*, Lusardi v. Xerox Corp., 99 F.R.D. 89, 92–93 (D.N.J. 1983) (certifying class action pursuant to 29 U.S.C. § 216(b)) *with, e.g.*, Held v. National R.R. Passenger Corp., 101 F.R.D. 420, 421 (D.D.C. 1984) (holding ADEA action may not be maintained as class action). *See* Spahn, *Resurrecting the Spurious Class: Opting-in to the Age Discrimination in Employment Act & The Equal Pay Act Through the Fair Labor Standards Act*, 71 GEO. L.J. 119, 122, 132–33 (1982) (arguing that class action device, albeit opt-in, is essential for ADEA enforcement). Whether an action is treated as a class as opposed to a permissive joinder has important implications for purposes of jurisdiction and the statute of limitations. Spahn, *supra*, at 132. Spahn argues that notice to potential plaintiffs should be mandatory in opt-in class actions in order to effectuate the Acts' purposes. *Id.* at 140. *See also* Comment, *The Class Action Suit Under the Age Discrimination in Employment Act: Current Status, Controversies, and Suggested Clarifications*, 32 HASTINGS L.J. 1377, 1388 n.73 (1981) (identifying cases treating 16(b) actions as joinder devices).

21. Section 7(b) of the ADEA incorporates the enforcement procedures of the FLSA, including the opt-in procedures of § 216(b). *See, e.g.*, Sperling v. Hoffman-LaRoche, Inc., 862 F.2d 439, 447 (1988), *aff'd*, 110 S. Ct. 482 (1989) (allowing notice in ADEA action); *McKenna*, 747 F.2d at 1214 (not allowing notice); *Woods*, 686 F.2d at 579–82 (allowing plaintiffs' counsel, not court, to send notice).

22. *See, e.g.*, *Pan Am. World Airways*, 523 F.2d at 1077 n.3.

23. *See infra* note 125 and accompanying text.

24. *See, e.g.*, *McKenna*, 747 F.2d at 1217 ("An invitation from counsel to particular plaintiffs to join a particular lawsuit is potentially a champertous communication."). "Champerty" is the

notice have emphasized the absence of specific prohibition,[25] the inherent power of the federal judiciary to manage its caseload,[26] the efficiency and economics of case consolidation,[27] and the furtherance of various statutory policies through notice.[28]

C. *The Pre-* Sperling *Cases*

Because the FLSA and, by incorporation, the ADEA provide that class actions may only be maintained on behalf of employees who have affirmatively consented to join,[29] many courts have grappled with plaintiffs' requests for both discovery of identities of possible class members and notice to such persons of the pendency of the putative collective action. Not surprisingly, defendants in these actions have vigorously opposed such efforts. The various courts of appeals that have addressed this controversy have produced widely differing responses. These range from outright endorsement of the district

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practice whereby one with no personal interest in a dispute undertakes litigation at his own expense with the promise from the interested party of some share of the recovery. *See* Peck v. Heurich, 167 U.S. 624, 632 (1897) (quoting the lower court's opinion, 6 App. D.C. 273, 283–84 (1895): "We must regard an agreement by any attorney to undertake the conduct of a litigation on his own account, to pay the costs and expenses thereof, and to receive as his compensation a portion of the proceeds of the recovery, or of the thing in dispute, as obnoxious to the law against champerty"). "Barratry" is the offense of stirring up litigation, W. GILMER, JR., THE LAW DICTIONARY 42 (6th ed. 1986), or the process of repeatedly engaging in champerty, *In re* Primus, 436 U.S. 412, 425 n.15 (1978).

25. *Woods*, 686 F.2d at 581 (approving notice by plaintiff, but not by court); *see also Pan Am. World Airways*, 523 F.2d at 1082 (Schnacke, J., dissenting) ("The question is not whether some rule permits the action proposed, but whether any rule, statute, or logical concept forbids it.").

26. *See, e.g., Woods*, 686 F.2d at 580; *see also* Link v. Wabash R.R. Co., 370 U.S. 626, 630–31 (1961) ("The authority of a court to dismiss sua sponte for lack of prosecution has generally been considered an 'inherent power,' governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases."); *In re* Air Crash Disaster on Dec. 29, 1972, 549 F.2d 1006, 1012–16 (5th Cir. 1977) (court's inherent managerial power allows it to require consolidation, designate lead counsel and reallocate attorneys' fees, despite counsel's objections); Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 299, 328 (1973) ("Basically Rule 23(d)(2) is a catch-all and merely codifies the inherent judicial power to give notice to absent parties whenever the court deems it advisable to do so."); *cf. In Re* Air Crash Disaster, 476 F. Supp. 445, 451 (1979) (Judicial Panel on Multidistrict Litigation) (finding Panel had no authority to notify potential plaintiffs of pending litigation, and suggesting that any such request be directed to district judge).

27. *See, e.g., Pan Am. World Airways*, 523 F.2d at 1082 (Schnacke, J., dissenting); Allen v. Marshall Field & Co., 93 F.R.D. 438, 444 (N.D. Ill. 1982); Johnson v. American Airlines, 531 F. Supp. 957, 960 (N.D. Tex. 1982) (consolidation of all cases will result in more efficient disposition of claims).

28. *See, e.g.*, Braunstein v. Eastern Photographic Laboratories, 600 F.2d 335, 336 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979); Lusardi v. Xerox Corp., 99 F.R.D. 89, 93 (D.N.J. 1983) (notice furthers remedial purposes of ADEA and avoids multiplicity of suits).

29. *See supra* notes 20–21.

court's power to issue notice,[30] to allowing discovery from defendants to facilitate notice,[31] to prohibiting the district court from issuing notice itself while allowing it to approve notice issued by plaintiff or his counsel,[32] to allowing notice as long as plaintiff does not enlist the district court's help either in obtaining the identities of putative class members or in sending notice,[33] to prohibiting plaintiff's lawyer from issuing notice,[34] although plaintiff himself may be able to do so,[35] to prohibiting notice altogether.[36] Such was the confused state of the law until the Supreme Court entered the fray in *Hoffmann-La Roche, Inc. v. Sperling.*[37]

D. Hoffmann-La Roche, Inc. v. Sperling

After Hoffmann-La Roche ordered a reduction in force of some 1200 workers in 1985, Richard Sperling filed a complaint with the EEOC under the ADEA on behalf of himself and all similarly situated employees of Hoffmann-La Roche.[38] With the assistance of counsel, Sperling and some of his fellow employees formed Roche Age Discriminatees Asking Redress (R.A.D.A.R.). Using R.A.D.A.R.'s letterhead, they sent notice to some 600 employees they believed were adversely affected on the basis of age by the Hoffmann-La Roche layoff. The letter invited its recipients to join planned litigation by returning a signed consent form. Plaintiffs sought the completed forms in order to fulfill the statutory requirement that each member joining in an ADEA class action submit consent in writing.[39]

When the members of R.A.D.A.R. filed suit in federal district court, they submitted over 400 signed consent forms received in

30. *Braunstein*, 600 F.2d at 336.

31. United States v. Cook, 795 F.2d 987, 993 (Fed. Cir. 1986).

32. Woods v. New York Life Ins. Co., 686 F.2d 578, 579–80 (7th Cir. 1982).

33. Dolan v. Project Constr. Corp., 725 F.2d 1263, 1268–69 (10th Cir. 1984).

34. McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1214–17 (8th Cir. 1984).

35. *Id.* at 1217 (McMillian, J., concurring); *see also* Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 860 (9th Cir. 1977).

36. *Kinney Shoe Corp.*, 564 F.2d at 863. The court did not, however, rule out the possibility that discovery of potential plaintiffs might nonetheless be permissible, and remanded that question to the district court. *Id.* at 864; *see also* Partlow v. Jewish Orphans' Home of Southern Cal., Inc., 645 F.2d 757, 758–59 (9th Cir. 1981). While following the rule in *Kinney,* however, the *Partlow* court allowed notice for purposes of informing previously notified persons of the invalidity of their filed consent forms. *Id.* at 759.

37. 110 S. Ct. 482 (1989).

38. *Id.* at 485. Apparently, the EEOC did not act on the complaint, and plaintiff fulfilled the requisite administrative filing requirements to enable him to file the ensuing ADEA lawsuit. *See* Sperling v. Hoffmann-La Roche, Inc., 118 F.R.D. 392, 395–96 (D.N.J.), *aff'd,* 862 F.2d 439 (3d Cir. 1988), *aff'd,* 110 S. Ct. 482 (1989).

39. *Sperling,* 110 S. Ct. at 485.

response to the mailing. To insure that all affected employees had received notice, plaintiffs sought discovery of the names and addresses of all similarly-situated employees, and asked the district judge to send notice to all affected employees who had not yet submitted consent forms. Hoffmann-La Roche resisted both motions, and cross-moved to have the court declare invalid the consents already received. The district court denied Hoffmann-La Roche's motion and ordered it to comply with the discovery request. The court further authorized plaintiffs to send court-approved notice to all employees who had not yet consented to join the suit, asserting that it was appropriate for the trial court to facilitate notice to potential class members in an ADEA action as long as the communication made clear that the court took no position on the merits of the claim.[40] On interlocutory appeal, the circuit court upheld the authority of the district court to facilitate notice.[41]

Justice Kennedy, writing for seven members of the Court,[42] agreed with the lower courts. The majority reasoned that because Congress explicitly provided for collective suits in the ADEA, it must have intended the trial judge to possess the requisite procedural and managerial powers to insure that such suits proceed efficiently, at least to the extent that such powers are not *inconsistent* with the federal rules.[43] These powers include allowing appropriate discovery to ascertain the identities of putative class members, as well as the power to authorize appropriate notice to such persons. The Court noted the value of the collective action device—it allows victims of age discrimination to pool their resources and thus incur lower individual costs in pursuing redress. It also benefits the judicial system by affording resolution in a single proceeding of multiple disputes arising from the same alleged discriminatory activity.[44]

The Court recognized that the virtue of court oversight of notice sent in Rule 23 class actions,[45] namely insuring that counsel refrain from inappropriate communications, exists in the ADEA situation as well.[46] The Court reasoned that because judicial involvement is inevitable in an ADEA collective suit, it is better that such involvement

40. *Id.*

41. *Id.* at 486 ("[T]here is no legal impediment to court-authorized notice in an appropriate case." (quoting 862 F.2d 439, 447 (3d Cir. 1988)).

42. Justices Scalia and Rehnquist dissented. *Id.* at 488–92 (Scalia, J., dissenting).

43. *Id.* at 486.

44. *Id.*

45. *See* Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981) (affirming duty and authority of district court to oversee counsel's conduct in Rule 23 class action).

46. 110 S. Ct. at 486–87.

begin early and that it not depend on the initiative of counsel or litigating parties.[47]

Rather than viewing the federal rules as a general source of authority for the trial court's exercise of discretion, the Court stated that "*[i]n the context of the explicit statutory direction of a single ADEA action for multiple ADEA plaintiffs,* the Federal Rules of Civil Procedure provide further support for the trial court's authority to facilitate notice."[48] The Court identified both Rules 83 and 16(b) as furnishing this support. Rule 83 provides, in relevant part: "In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."[49] Rule 16 authorizes the trial court to enter scheduling orders and to address the need for any special procedures if the case before the court is complex.[50] The Court failed, however, to explain any special relevance of the ADEA's statutory scheme to the rules on which the court relied.

The Court further rejected Hoffmann-La Roche's argument that the legislative history surrounding the 1947 amendments to the FLSA, known as the Portal-to-Portal Act,[51] reveals Congress's intent to decrease the burden imposed on employers by the collective action device.[52] The legislative history of the FLSA, wrote the majority,

47. *Id.* at 487 ("The court is not limited to passive waiting for objections about the manner in which the consents were obtained."). The Court went on to say that "[c]ourt authorization of notice serves the legitimate goal of avoiding a multiplicity of duplicative suits and setting cut-off dates to expedite disposition of the action." *Id.*

48. *Id.* at 487 (emphasis added).

49. FED. R. CIV. P. 83.

50. FED. R. CIV. P. 16(b), 16(c)(10).

51. 29 U.S.C. §§ 251–262 (1988).

52. 110 S. Ct. at 488. As the Court noted, the legislative history of the Act indicates that the principal procedural purpose of the Portal-to-Portal Act was to prohibit representative—as opposed to collective—actions. Prior to the amendment, persons not members of the affected classes could bring actions on behalf of the class. Concerned that this was creating opportunities for abuse, Congress prohibited such representative actions, but preserved the collective action, or opt-in class approach. *Id.* The Court cited 93 CONG. REC. 538, 2182 (March 18, 1947) (remarks of Sen. Donnell), distinguishing collective actions from representative suits, the latter still authorized by the FLSA:

> But the second class of cases, namely cases in which an outsider, perhaps someone who is desirous of stirring up litigation without being an employee at all, is permitted to be the plaintiff in the case, may result in very decidedly unwholesome champertous situations which we think should not be permitted under the law.

See also United States v. Cook, 795 F.2d 987, 993 (Fed. Cir. 1986).

Nonetheless, some lower courts had interpreted the legislative history behind the Portal-to-Portal Act as evidence of congressional intent to remove courts from active participation in class actions under the FLSA, and concluded that the district courts thus had no power to notify putative plaintiffs. *See, e.g.,* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267 (10th Cir. 1984).

must be interpreted in light of congressional intent that "[t]he broad remedial goal of the statute should be enforced to the full extent of its terms."[53]

Justice Scalia, joined by Chief Justice Renquist, dissented, maintaining that the exercise of case management powers in this case was "*not at all* designed to facilitate the adjudication of any claim before the court."[54] Justice Kennedy focused on the question of whether the district court's management responsibilities and authority included facilitating discovery of the identities of, and notice to, additional parties.[55] Justice Scalia, however, observed that the absent persons to whom notice was sent were *not* parties.[56] Under the ADEA the absent persons could not be parties until they had affirmatively consented to join the action. Justice Scalia explained that if they were not parties, they were not participants in any case or controversy before the court, and therefore the court was powerless to communicate with them.[57] Thus he found the majority's decision to allow discovery of the identities of putative plaintiffs and approval of notice to them to be inconsistent with the case-or-controversy requirement of Article III.[58]

Scalia acknowledged that Congress could give an executive agency the authority to demand from an employer the identities of persons allegedly affected by the employer's discriminatory action, that the agency could furnish plaintiffs' counsel with such a list, and that counsel might then notify such persons of pending litigation in which they might join.[59] He deemed this, however, to be irrelevant to the court's assertion of such power, which, "*if not unconstitutional,* [is] *at least so out of accord with age-old practices that surely it should not be assumed unless it has been clearly conferred.*"[60] Scalia found no such explicit expression of authority in either section 16(b) of the FLSA, or in the

53. 110 S. Ct. at 488.

54. *Id.* at 488–89 (emphasis in original).

55. *Id.* at 486.

56. *Id.* at 489 (Scalia, J., dissenting).

57. *Id.* Justice Scalia's assertions about the limited power of Article III judges are not easily reconciled with the majority decision he joined in Martin v. Wilks, 490 U.S. 755 (1989), making not merely notice to potentially affected persons, but actual participation and agreement by such persons, the linchpin for a nonimpeachable consent decree. *Id.* at 765; *see infra* note 82. In fact, as one of my colleagues has observed, the one unifying thread is the Justice's apparent opposition to the assertion of discrimination claims. Letter from Jeffrey Stempel to Marjorie Silver (Sept. 10, 1990) (on file with the *Washington Law Review*).

58. 110 S. Ct. at 489 (Scalia, J., dissenting).

59. *Id.*

60. *Id.* (emphasis added).

federal rules.[61] He drew a clear distinction between the trial court's powers and responsibilities as to absent parties in a Rule 23 class action, and its responsibilities toward the "members of the public at large" such as those to whom the *Sperling* district judge approved notice.[62] While acknowledging the validity of the majority's desire to facilitate the adjudication of cases not yet filed,[63] Scalia admonished that "[t]he problem is that it is a justification in policy but not in law."[64]

The central problem with the majority's opinion is that it implies that judicial power to notify depends on the legal basis for the claim. The *Sperling* decision suggests that it is the nature of the FLSA/ ADEA scheme, rather than inherent judicial power, that empowers the trial court to notify putative plaintiffs. The power to issue notice does not come from the statute at all; at best the ADEA is neutral, neither endorsing nor prohibiting collective actions brought by actual members of the class.[65] The Court need not look to Congress to find authority to send or authorize notice. It is the judiciary's responsibil-

61. *Id.* at 490–91. Justice Scalia not only derided the majority's interpretation of Rule 83, *id.* at 491 ("The Court's repeated reliance upon Rule 83 is so strained that it snaps."), he argued that to allow the solicitation of persons who have not themselves presented a claim to the court violates Rule 82, which provides that the Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." *Id.* at 490. Rule 82, however, does no more here than state the constitutionally obvious: only Congress, circumscribed by Article III, can extend the courts' jurisdiction. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I),* 81 HARV. L. REV. 356, 399 (1967) (" 'Jurisdiction' here means subject matter jurisdiction, and in this respect rule 82 may describe an inherent limitation on the rulemaking power.").

Justice Scalia also argued that the trial court's discovery order was invalid as it was not issued for a purpose allowed by Rule 26. 110 S. Ct. at 491 (Scalia, J., dissenting).

62. 110 S. Ct. at 490 (Scalia, J., dissenting). Justice Scalia apparently ignored the fact that, despite the distinction between the Rule 23 "opt-out" class and the § 16(b) "opt-in" class, both are nonetheless class actions, and thus it follows that if the district court has notification power under Rule 23, it should as well under § 16(b): a notified individual is not conclusively a party until that person exercises his discretion either to not opt-out, under Rule 23, or to opt-in under Rule 16. Scalia's arguments, if they have force at all, do so in regard to the authority of judges in non-class complex litigation to notify those "members of the public at large" who may have particular interest in the pending litigation. *See* FED. R. CIV. P. 23(d)(2) advisory committee's notes (1966) ("Notice is available fundamentally 'for the protection of the members of the class or otherwise for the fair conduct of the action' and should not be used merely as a device for the undesirable solicitation of claims." (citations omitted)). Even so, any distinction between class actions and large joinders for purposes of notice is largely artificial, and the due process distinction based on res judicata, *see infra* notes 83–88 and accompanying text, is unsatisfactory.

63. 110 S. Ct. at 491 (Scalia, J., dissenting) ("I concede that this justification, at least, is entirely valid.").

64. *Id.*

65. Scalia correctly observes that were the statute silent with respect to the class issue, plaintiffs could have brought a class action even *without* the consent of other members of the class. *Id.* at 489.

ity as the countermajoritarian branch of government to empower the disempowered.[66] The power to send notice of pending litigation to those often unaware of their legal rights is implicit in the court's role as guardian of the underrepresented.[67] Justice Scalia errs in concluding that because no explicit mandate exists for the assertion of what he characterizes as the extraordinary power to facilitate notice to potential plaintiffs,[68] such power does not exist. I submit that it does, that it is not extraordinary, and that it is not limited to class actions, whether arising under Rule 23 or elsewhere.

III. NOTIFICATION UNDER THE FEDERAL RULES

The second sentence of the first Federal Rule of Civil Procedure, unchanged since its promulgation in 1938, provides that the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action."[69] The rules create procedures consistent with and in furtherance of this exhortation. Is this goal to be construed to apply only to parties who present themselves to the court, or does it extend to others having the same rights as the plaintiffs who have filed the litigation? Despite numerous substantive revisions, the rules remain silent about notice to putative plaintiffs.[70] The import of this silence is controversial. Some courts have concluded that the absence of a specific prescription in the rules is fatal to a request for notice.[71] Nonetheless, the purpose of the rules as originally enacted,

66. *See, e.g.*, Yamamoto, *supra* note 1, at 417–18 (criticizing diminished access to courts in view of the need for judicial zealousness in protecting minority rights due to their lack of meaningful protection by political branches of government).

67. *See infra* notes 126–127 and accompanying text.

68. *See* 110 S. Ct. at 488 (Scalia, J., dissenting).

69. FED. R. CIV. P. 1.

70. The exception is, of course, Rule 23's provisions for notice with respect to class actions. *See* FED. R. CIV. P. 23(c)(2), 23(d)(2).

71. In Pan Am. World Airways, Inc. v. United States Dist. Court, 523 F.2d 1073 (9th Cir. 1975), for example, the majority rejected the district court's assertion of power to discover and notify putative plaintiffs, after marching through each of the rules arguably relevant to the notice question. The case grew from lawsuits precipitated by two airline disasters. In one of the suits, at least ten different actions had been filed around the country, all of which were consolidated by the Panel of Multidistrict Litigation before Judge Peirson Hall of the Central District of California. *See supra* note 8 and accompanying text. Defendants sought and obtained mandamus to challenge Judge Hall's order to produce a list of passengers and their next of kin. 525 F.2d at 1075.

Rule 1, said the court, dictates how the other rules are to be interpreted, but does not itself allow a court to create new rules of procedure. *Id.* at 1078. Rule 16 sets forth the trial judge's power to conduct pretrial conferences, but does not authorize notice to others. *Id.* Rule 19, which provides for joinder of necessary parties, was inapplicable as the district court judge did not purport to join the persons he sought to notify, and furthermore there was no dispute that complete relief could not be accorded among the current parties to the dispute. *Id.* Rule 83 was

and as subsequently amended, comports with this Article's position that because such notice is nowhere expressly forbidden, the decision to issue notice is within the inherent residual discretion of the trial judge.

In 1966, Federal Rule of Civil Procedure 23(d)(2) was amended to empower the district judge to:

> [M]ake appropriate orders . . . requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action . . . .

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inapplicable because notification to potential plaintiffs was not authorized by any rule, and, said the majority, "a procedure that deviates so sharply from the traditional role of the judiciary cannot be justified as an ad hoc rule of practice." *Id.*

The court found arguments concerning authorization of notice based on Rules 21, 23, and 42 somewhat more "forceful." *Id.* Although one of the consolidated actions was styled as a class action, *id.* at 1075, the court held that Rule 23 did not authorize notice prior to class certification:

> The admitted purpose of the notice in this case is to bring the claims of unnamed members of the plaintiff class before the court. Notice for this purpose usually has been thought to issue only after certification of a class action. Otherwise, by notice and joinder of unnamed members of a possible plaintiff class, a district court could circumvent Rule 23 by creating a mass of joined claims that resembles a class action but fails to satisfy the requirements of the rule.

Id. at 1079 (citations omitted). The court stopped short of asserting that pre-certification notice was never proper: "I do not pass upon the district court's power to issue pre-certification notice beyond stating that if available, it does not extend to this case." *Id.* at 1079 n.6.

Rule 21 (Misjoinder and Non-Joinder of Parties), according to the court, although a facilitator of joinder under Rule 20 (Permissive Joinder of Parties), did not authorize massive notice, which, if successful, would "effectively transform the present action into an unwieldy pseudo-class-action not authorized by Rule 23." *Id.* at 1079–80. "Rules 20 and 21 cannot be read to circumvent the requirements of that rule." *Id.* at 1080. Judge Hufstedler, concurring specially, added that Rule 20 was "inapplicable because none of these nonparties is presently asserting any right to relief." *Id.* at 1082. Finally, the court held that Rule 42 only allowed for consolidation of cases already filed. *Id.* Thus the court concluded that because none of the federal rules explicitly authorized notice, the district court had exceeded its powers in its efforts to notify putative plaintiffs.

The dissent, in contrast, asserted that because no provision of the rules or other law forbids courts from sending the kind of notice that Judge Hall sought to send, he had the authority to do so. *Id.* at 1082 (Schnacke, J., dissenting).

See also Kaplan, *supra* note 61, at 365–66 (suggesting that under the indispensable parties provisions in Rule 19 "[i]t is not improper, and may make good sense, for a party or the court to notify the absentee informally of the pendency of the action so that he may consider what to do.").

Arguably, this provision merely codifies the district court's inherent power to issue notice in Rule 23 and non-Rule 23 litigation alike.[72] Admittedly, the evidence that this was its explicit intent is inconclusive.[73] Although the purpose of Rule 23(d)(2) is to endorse the trial court's discretion regarding notice,[74] the purpose of such notice is principally to protect the due process interests of class members.[75] Nonetheless, legitimating notice for purposes other than due process in no way clashes with the policies underlying Rule 23.

Recent amendments to the federal rules affirmatively support the view that notice in complex litigation furthers the current rules' policies. The 1983 amendments to Rules 11, 16 and 26 focused the powers and responsibilities of the federal trial judge on the active management of each case.[76] Rule 11 increased the pre-filing responsibilities of the litigants and their counsel. Rule 16 was transformed into an active case management tool. Although the previous rule had helped to dispose of cases more efficiently, the amended rule explicitly obliged the district court to manage the litigation, as well as facilitate settlement.[77] Similarly, the amendments to Rule 26 governing discovery empowered the trial court to prescribe reasonable limits on discovery, whether or not requested by counsel.[78] The amendments strengthened all three of

72. *See* Miller, *supra* note 26, at 328.

73. For example, the FED. R. CIV. P. 23(d)(2) advisory committee notes (1966) caution that notice "not be used merely as a device for the undesirable solicitation of claims."

74. *See id.* ("Rule 23(d)(2) does not require notice at any stage, but rather calls attention to its availability and invokes the court's discretion").

75. *Id.* ("This mandatory notice [for 23(b)(3) class actions] pursuant to subdivision (c)(2), together with any discretionary notice which the court may find it advisable to give under subdivision (d)(2), is designed to fulfill requirements of due process to which the class action procedure is of course subject."); *see* Miller v. Chinchilla Group, Inc., 66 F.R.D. 411, 416–17 (S.D. Iowa 1975) (denying class action notification and ordering notice to absent purported class members to protect their interests).

76. *See* A. MILLER, THE AUGUST 1983 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE: PROMOTING EFFECTIVE CASE MANAGEMENT AND LAWYER RESPONSIBILITY 2, 22, 30 (1984) (remarks at Federal Judicial Center Workshop) (discussing how amendments to Rules 7, 11, 16, and 26 represent an integrated package).

77. *See* FED. R. CIV. P. 16 advisory committee's notes (1983) (emphasis added) (citations omitted):

> In many respects, the [old] rule has been a success. For example, there is evidence that pretrial conferences may improve the quality of justice rendered in the federal courts by sharpening the preparation and presentation of cases, tending to eliminate trial surprise, and improving, as well as facilitating, the settlement process. However, in other respects particularly with regard to case management, the rule has not always been as helpful as it might have been. Thus there has been a widespread feeling that amendment is necessary to encourage pretrial *management that meets the needs of modern litigation.*

78. *See* FED. R. CIV. P. 26 advisory committee's notes (1983):

> The amendment . . . is designed to encourage district judges to identify instances of needless discovery and to limit the use of the various discovery devices accordingly . . . . [The

these rules by empowering the judge to impose sanctions for the rules' violations. Nor is the court's power merely reactive. Under Rules 11, 16, and 26, a judge may impose sanctions upon a party and that party's lawyer upon motion by opposing counsel or the court's own initiative.[79]

These amendments to the rules reflected as much as precipitated developments in the role of the trial judge. Responding to the swell of complex litigation, courts have reexamined and frequently redefined their participation in litigation.[80] The promulgation of the *MCL* represents one attempt to guide district judges through the thorny thickets of complicated litigation.[81] Yet the manual, too, is silent about notifying putative plaintiffs of pending litigation outside the class action context.[82]

Although the Rules fail to resolve the question of the trial court's power to notify putative plaintiffs, they suggest a mood consonant with this power. Congress has yet to clarify the court's authority to issue notice. As discussed below, however, rather than interposing obstacles to judicially approved notice, the Constitution permits, if not actually compels, the trial court's exercise of authority to notify absent persons of pending litigation.

IV. NOTIFICATION AND DUE PROCESS

The primary rationale for the notice requirement in Rule 23 is due process. A true class action will bind all members in the class, barring them from bringing actions to litigate the adjudicated claims. While some actions brought under Rule 23(b)(1) and (2) by their nature

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amendment to 26(b)] is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse.

79. FED. R. CIV. P. 11, 16, 26. The purpose of imposing sanctions even without any party initiative is stated in the 1983 advisory committee's notes to Rule 11: "Authority to [impose sanctions sua sponte] has been made explicit in order to overcome the traditional reluctance of courts to intervene unless requested by one of the parties."

80. *See, e.g.*, Chayes, *supra* note 10, at 1302 ("The judge is not passive, his function limited to analysis and statement of governing rules; he is active, with responsibility not only for credible fact evaluation but for organizing and shaping the litigation to ensure a just and viable outcome."); *see also* Resnik, *Managerial Judges,* 96 HARV. L. REV. 376, 379 (1982) (cautioning that new management responsibilities of district judges—especially those pretrial—may lead to judicial control at other phases of the litigation).

81. *See* MCL, *supra* note 13, at v–viii.

82. In fact, the first edition of the *MCL* encouraged district courts to adopt local rules requiring judicial preclearance of all communications between counsel and absent class members. MCL, *supra* note 13, at § 1.41. After the Court's decision in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981), the *MCL* was revised to omit this provision. *See* MCL 2D, *supra* note 13.

require class treatment,[83] others, such as those brought under 23(b)(3), often are class actions only because the named plaintiffs have styled them as such, and because the court has certified that they meet requirements of commonality and adequacy of representation, and that the class action is a better method than any other alternative.[84] Those notified are afforded the opportunity to "opt-out" of the class. If they do, they may bring their own causes of action, intervene in the current action, or do nothing.[85] The failure to opt-out, however, binds them to the ultimate results of the class action. Thus due process requires that all members of a class in an opt-out class action receive adequate notice of their rights and responsibilities.[86]

In contrast, the opt-in class action judgment binds only those who have affirmatively consented to join the class. Because potential class members will only be bound by the judgment if they affirmatively

83. *See* FED. R. CIV. P. 23 advisory committee notes (giving examples of Rule 23(b)(1) & (2) class actions, *e.g.*, suits brought to abate a nuisance, to have a corporation declare a dividend, or to enjoin a racially-segregated school system).

84. *See* FED. R. CIV. P. 23(b)(3) advisory committee's notes (1966):

> In the situations to which this subdivision relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

85. FED. R. CIV. P. 23(c)(2), providing that:

> The notice shall advise each member that (A) the court will exclude the member from the class if [the member] so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if [the member] desires, enter an appearance through . . . counsel.

86. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314–15 (1950) (due process requires reasonable notice under the circumstances in order for a judgment to be binding on class).

In its 1989 Spring term, the Court issued a number of opinions assaulting formerly settled civil rights doctrine. One of these, Martin v. Wilks, 490 U.S. 755 (1989), affirmed the rights of disaffected white firefighters to collaterally attack a consent decree resolving discrimination charges against black firefighters in the city of Birmingham, Alabama. Due process, claimed Justice Rehnquist for the 5-4 majority, prohibited binding persons who had not participated in the former litigation to a resultant consent decree, regardless of whether they had been given the opportunity to intervene. Congress then attempted to legislatively overrule *Wilks*, by providing that third parties who receive notice of the proposed consent decree and have a reasonable opportunity to present objections to it, or whose interests were otherwise adequately represented, will be unable to collaterally attack any consent decree rendered. H.R. 4000, 101st Cong., 2d Sess. § 6, 136 CONG. REC. H364 (Civil Rights Act of 1990); S. 2104, 101st Cong., 2d Sess. § 6, 136 CONG. REC. S991 (Civil Rights Act of 1990); H.R. 1, 102d Cong., 1st Sess. § 6, 137 CONG. REC. E33 (Civil Rights Act of 1991). The bill also provides that it is not intended to deny any person of due process of law. Civil Rights Act of 1991 § 6(m)(2)(D). Despite this provision, the constitutionality of such legislation, if it becomes law, is likely to be challenged. Nevertheless, such notice is an appropriate response to reconcile the competing interests of eradicating discrimination and protecting the perhaps inchoate process rights of affected nonparties.

agreed to join, lack of notice to them of the pending action does not offend due process. They stand in virtually the same position for purposes of preclusion as one who had the opportunity to intervene as a party in a pending suit but chose not to.[87] Thus the fourteenth and fifth amendments provide no resolution of the notice question for cases not covered by Rule 23, be they opt-in class actions, mass joinders, or other sorts of complex litigation.[88]

V. NOTIFICATION AND ARTICLE III

In his *Sperling* dissent, Justice Scalia argued that the majority's decision violated Article III of the Constitution.[89] He asserted that a court has no power to act beyond the confines of specific cases or controversies. Members of the public at large who might have an interest in a pending lawsuit, unlike absent class action parties, are none of the court's business.[90]

Justice Scalia stopped short of asserting that authority to issue notice would violate Article III if Congress were to provide for it

87. *See* FED. R. CIV. P. 24 (Intervention). A putative plaintiff who declined to participate would not be bound by a decision in favor of the defendant; however, it is unlikely she would be able to rely on offensive collateral estoppel should plaintiffs prevail. *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 329–30 (1979) (offensive collateral estoppel not appropriate, where party relying on it had opportunity to join in first litigation and chose not to).

88. *See* McKenna v. Champion Int'l Corp., 747 F.2d 1211, 1213 (8th Cir. 1984) (distinguishing Rule 23 notice by due process concerns); Braunstein v. Eastern Photographic Laboratories, 600 F.2d 335, 336 (2d Cir. 1978), *cert. denied,* 441 U.S. 944 (1979) (affirming court's power to issue notice while acknowledging no violation of due process); Kinney Shoe Corp. v. Vorhes, 564 F.2d 859, 863 (9th Cir. 1977); Roshto v. Chrysler Corp., 67 F.R.D. 28, 29–30 (E.D. La. 1975) (distinguishing Rule 23 notice by due process concerns).

89. Hoffman-La Roche, Inc. v. Sperling, 110 S. Ct. 482, 489–90 (1989) (Scalia, J., dissenting).

90. *Id.* at 490. Justice Scalia reached deeply into history to support his assertion that a court is acting on something other than a "case or controversy" when it sends notice to persons who might be interested in joining pending litigation. He attempted to build his argument solely on late-eighteenth through early-twentieth century jurisprudence. *See, e.g.,* Muskrat v. United States, 219 U.S. 346, 357 (1911) (Congress violated Article III by conferring power on Court to pass on constitutionality of legislation in absence of case or controversy); Osborn v. Bank of United States, 22 U.S. (9 Wheat.) 738, 819 (1824) (Article III "power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case."). These cases, however, only address the court's powers over adjudication. The notification of absent persons regarding litigation currently pending before the court is not adjudication with respect to the rights of those persons, although it may precipitate their participation in an ongoing case or controversy currently before the court. *See* Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1082 (9th Cir. 1975) (Schnacke, J., dissenting) ("[Majority insists that the] intended notice to potential plaintiffs is process of some sort. Clearly, it is not. The notice brings in no new parties, imposes no burdens and affords no rights. The recipients of the notice are completely free to disregard it."). Thus not only does Justice Scalia ignore Supreme Court separation of powers doctrine since 1911, *see infra* note 97 and accompanying text, his historical approach fails to justify his conclusions.

explicitly.[91] What he did say, however, is reminiscent of the so-called "clear statement doctrine" invoked by the Court from time to time, often to sidestep the resolution of constitutional questions:[92] unless specifically authorized by Congress, courts are not to presume so extraordinary a power.[93]

Justice Scalia's concern about the scope of Article III is unfounded. Our judiciary possesses numerous powers that are collateral to its role as adjudicator of cases and controversies. Some of these are expressly granted; others are implicit. The power to promulgate procedural rules, for example, is an explicit collateral power.[94] The power to help formulate sentencing guidelines is another.[95] The power to hold an

91. 110 S. Ct. at 492 (Scalia, J., dissenting). Justice Scalia does not go so far as to state that an Article III problem would exist even were Congress—or the Court through the congressionally approved federal Rules—to confer such power on the district courts. This is, perhaps, a begrudging acknowledgement that his views on separation of powers are discordant with those of the Court's majority generally on this topic. Given the rather strict constructionist view of separation of powers Justice Scalia articulated in his dissenting opinions in Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting), and Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting), and given his comfort with departing from precedent, *see, e.g.*, Rutan v. Republican Party, 110 S. Ct. 2729, 2756 (1990) (Scalia, J., dissenting) (arguing that previous Court decisions striking down patronage-based employment decisions should be overruled); Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3064–67 (1989) (Scalia, J., concurring in part and concurring in the judgment) (advocating that the Court explicitly overrule *Roe v. Wade*), he may very well insist, should such a case come before him, that congressionally-mandated power to notify nonparties violates Article III. His would undoubtedly be a minority view.

92. *See, e.g.*, Industrial Union Dep't AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 645 (1980) (refusing to assume agency had authority to regulate nonsignificant risks of leukemia in absence of clear statutory mandate); Kent v. Dulles, 357 U.S. 116, 129–30 (1958) (despite broad delegation of power, Court will not infer that Congress intended to grant Secretary of State authority to withhold passports based on a citizen's associations or beliefs); *see also* Note, *Intent, Clear Statements, and the Common Law: Statutory Interpretation in the Supreme Court*, 95 HARV. L. REV. 892, 909 (1982) (application of the clear statement doctrine "can postpone the day of constitutional reckoning for collisions between individual rights and congressional power by truncating statutes before they enter the zone of constitutional challenge").

93. 110 S. Ct. at 489 (Scalia, J., dissenting); *see supra* text accompanying note 60.

94. Rules Enabling Act, 28 U.S.C. §§ 2071, 2072 (1988); FED. R. CIV. P. 83.

95. Mistretta v. United States, 488 U.S. 361, 388–89 (1989):

> Our approach to other nonadjudicatory activities that Congress has vested either in federal courts or in auxiliary bodies with the Judicial Branch has been identical to our approach to judicial rulemaking: consistent with the separation of powers, Congress may delegate to the Judicial Branch nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary . . . . [A]lthough the judicial power of the United States is limited by express provision of Article III to "Cases" and "Controversies," we have never held, and have clearly disavowed in practice, that the Constitution prohibits Congress from assigning to courts or auxiliary bodies within the Judicial Branch administrative or rulemaking duties that, in the words of Chief Justice Marshall, are "necessary and proper . . . for carrying into execution all the judgments which the judicial department has the power to pronounce." Wayman v. Southard, 10 Wheat., at 22.

attorney in contempt is implicit.[96] None of these "non-judicial" functions encroaches upon the essential functions of either of the other two branches of government. Thus their constitutionality is consistent with the Supreme Court's separation of powers jurisprudence.[97]

The difficult question is not whether the power to notify potential parties conforms to Article III. Rather, the real issue is whether the power to do so is inherent in the judicial function, rendering the need for explicit authorization unnecessary.[98] I suggest that not only is such power implicit, the denial of that power threatens to trample first amendment rights.

VI. NOTICE AND THE FIRST AMENDMENT

Recent Supreme Court decisions have largely eradicated the taboos regarding professional advertisement and solicitation. What was once deemed not only unprofessional but also unethical, and thus subject to sanctions,[99] has since become not only permissible but consistent with

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See also Morrison v. Olson, 487 U.S. 654, 680–81 (1988) (upholding provisions of Ethics in Government Act vesting in federal court miscellaneous powers with respect to independent counsel).

96. *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils, S.A., 481 U.S. 787, 793 (1987) (court's inherent power to initiate contempt proceedings includes authority to appoint private attorney as prosecutor); Shillitani v. United States, 384 U.S. 364, 370 (1966) (courts have inherent power to compel compliance with their lawful orders through civil contempt).

97. *See, e.g., Mistretta*, 488 U.S. at 382 (concerns of "encroachment and aggrandizement . . . ha[ve] animated our separation-of-powers jurisprudence and aroused our vigilance against the 'hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power' " (quoting INS v. Chadha, 462 U.S. 919, 951 (1983)). *Compare Chadha*, 462 U.S. at 951 (striking down legislative veto) *and* Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) (striking down exercise of Article III powers by Article I bankruptcy judge) *with Mistretta* 488 U.S. 361 (upholding constitutionality of federal sentencing guidelines) *and Morrison*, 487 U.S. 654 (upholding constitutionality of judicial appointment of independent counsel) *and* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) (upholding agency power to adjudicate state-law counterclaims).

98. *Compare* Woods v. New York Life Ins. Co., 686 F.2d 578, 581–82 (7th Cir. 1982) ("[W]e should require more than the generalities of Rule 83 or the All-Writs Act, 28 U.S.C. § 1651, to conclude that a federal judge, whose authority is confined by Article III of the Constitution to the exercise of the *judicial* power of the United States, may communicate with nonparties in this way.") *with* Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1082 (9th Cir. 1975) (Schnacke, J., dissenting) (asserting that relevant inquiry is not whether any law or rule permits notice, but whether any forbids it).

99. *See* J. AUERBACH, UNEQUAL JUSTICE 41–43 (1976). Auerbach tells how the ABA canons fostered the interests of established corporate lawyers who had the luxury of sitting in their offices and waiting for clients to come to them, at the expense of

> the new-immigrant neophyte in a large city where restricted firms monopolized the most lucrative business and thousands of attorneys scrambled for a share of the remainder . . . . The Canons, reflecting values appropriate to a small town, were easily adaptable to an equally homogeneous upper-class metropolitan constitutency, where they served as a club against lawyers whose clients were excluded from that culture: especially the urban poor,

our evolving concept of first amendment protection of commercial speech.[100] Lawyers, like cleaners, decorators, or banks, may advertise their services in order to attract customers, albeit subject to reasonable regulation.[101] Lawyers may now advertise their specializations,[102] as well as the fees they charge for particular services.[103] They may also target their advertisements toward persons known to have specific needs for these services.[104] Furthermore, in class action litigation, courts cannot prohibit truthful communications between class representatives or their attorneys and absent members of the class.[105] Because of the first amendment protection accorded commercial speech,[106] states generally may not discipline professionals for issuing truthful and nondeceptive written communications.[107] Given such developments, it is hardly surprising that the defendant in *Sperling* did

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new immigrants, and blue-collar workers. These lawyers confronted problems of client procurement which an established corporate practioner did not experience.

Id. at 42.

100. *See, e.g.,* Bates v. State Bar, 433 U.S. 350, 363–65 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council Inc., 425 U.S. 748 (1976).

101. *See, e.g.,* Peel v. Attorney Registration & Disciplinary Comm'n, 110 S. Ct. 2281, 2293 (1990) (Marshall, J., concurring in the judgment); *In re* R.M.J., 455 U.S. 191, 203 (1982).

102. *Peel,* 110 S. Ct. 2281.

103. *Bates,* 433 U.S. at 367–79.

104. Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 473–78 (1988).

105. Gulf Oil Co. v. Bernard, 452 U.S. 89, 102–03 (1981) (overruling trial court's order, based on *MCL* § 1.41, requiring pre-clearance of communications between counsel and absent class members). The original *MCL* § 1.41, *supra* note 13, which has no counterpart in *MCL 2d,* provided as follows:

1.41 Preventing Potential Abuse of Class Actions:

. . . .

[I]t is recommended that each court adopt a local rule forbidding *unapproved* direct or indirect written and oral communications by formal parties or their counsel with potential and actual class members who are not formal parties, provided that such proposed written communications submitted to and approved by order of court may be distributed to the parties or parties designated or described in the court order of approval.

106. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976).

107. *See, e.g.,* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 646 (1985) (government may not ban "truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising"); *In re* R.M.J., 455 U.S. 191, 203 (1982) (restrictions on professional advertising may be no broader than what is reasonably necessary to prevent deception).

The Court has carefully distinguished written solicitations from in person solicitations, and has so far only accorded first amendment protection to the former. *Compare Shapero,* 486 U.S. 466 (affirming attorneys' rights to mail targeted solicitations) *and Zauderer,* 471 U.S. 626 (striking down Ohio's prophylactic prohibition against use of legal advice and information in attorney advertising) *with* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (upholding prohibition against in-person solicitation).

not dispute the right of plaintiffs' counsel to solicit the consent of putative members of the opt-in class by mail.[108]

The rationale for first amendment protection of commercial speech emphasizes the interests of those on the receiving end of the communication.[109] In the attorney advertising cases in particular, the Court has noted the prospective client's interest in knowing the nature and cost of the legal services available, especially at a time when the client may be faced with a particular legal problem.[110]

If a putative plaintiff has a cognizable interest in receiving information that an attorney desires to send, then arguably that interest exists whether or not the attorney wants to send the information and whether or not it is the attorney who does the sending.[111] Thus any answer to the question of whether judges have the inherent power to issue notice must consider the rights of potential plaintiffs to receive

108. Brief for Petitioner at 40, Hoffmann-La Roche v. Sperling, 110 S. Ct. 482 (1989) (No. 88-1203); *see* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1268 (10th Cir. 1984) (acknowledging right of plaintiffs and counsel, without judicial assistance, to communicate with putative plaintiffs). In fact, a major thrust of defendant's argument was that the *Sperling* plaintiffs had already sent mailings to some 600 employees, had obtained the consent of 400 of them, and thus there was no need for the court to take the extraordinary step of sending notice under its imprimatur. *See* Sperling v. Hoffmann-La Roche, Inc., 862 F.2d 439, 447–48 (3d Cir. 1988), *aff'd*, 110 S. Ct. 482 (1989).

109. *See, e.g.*, Bates v. State Bar, 433 U.S. 350, 364 (1977) ("The listener's interest is substantial: the consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . [S]uch speech serves . . . interests in assuring informed and reliable decisionmaking."); *Virginia State Bd.*, 425 U.S. at 763–65 (first amendment protection applies to recipients of commercial information). The Court has articulated this right to receive information in other first amendment contexts as well. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (right of listeners paramount over rights of broadcasters); Griswold v. Connecticut, 381 U.S. 479, 482–83 (1965) (right to receive birth control information protected by first amendment).

110. *See, e.g., Shapero,* 486 U.S. at 473–74 (1988) ("[T]he First Amendment does not permit a ban on certain speech merely because it is more efficient; the State may not constitutionally ban a particular letter on the theory that to mail it only to those whom it would most interest is somehow inherently objectionable.").

111. New York has recently joined Texas, Florida, North Carolina and Virginia in promulgating rules regulating the sealing of court records upon request of counsel. The New York rule prohibits sealing absent a judicial finding of good cause, and empowers the court to notify third parties and give them an opportunity to be heard on a sealing motion. Wise, *Court Rule Adopted on Sealing Records,* N.Y.L.J., Feb. 5, 1991, at 1, col. 5. For one judge's opinion that the public has important interests in knowing what goes on in private litigation that seriously affects persons other than those who are parties to the litigation, and that judges should perhaps be empowered to reveal such information, see Forer, *When Should Judges Be Whistle Blowers?,* 27 JUDGES' J. 5, 7–9 (1988).

such information.[112] Despite, if not because of, the lack of any clear congressional or constitutional direction as to the existence and extent of the judiciary's right to impart information, and especially information which undoubtedly would be beneficial to the recipient,[113] first amendment values support the judge's power to notify putative plaintiffs.

The first amendment implications of the notice question warrant a variation on the clear statement doctrine approach.[114] If neither Congress nor the Court through its rulemaking function has specifically prohibited the court's issuance or approval of notice, courts should presume that such communications are permitted. Absent a clear proscription to the contrary, doubts ought be resolved in favor of speech.[115] Justice Scalia had it backwards.[116] What is extraordinary is not that courts presume such power in the absence of positive normative direction. Given the first amendment values involved, what is

112. *See* Braunstein v. Eastern Photographic Laboratories, 600 F.2d 335, 336 (2d Cir. 1978), *cert. denied,* 441 U.S. 944 (1979) (affirming power of district judge to issue notice, supported in part by "recent trend in the law" acknowledging attorneys' first amendment right to advertise).

What of the judge's first amendment rights? The judge's verbal and written expression, like that of the lawyer, is subject to reasonable regulation. For example, the judge's position warrants that she refrain from using words that manifest bias or prejudice, Model Code of Judicial Conduct Canon 3(B)(5) (1990); that she not comment publicly on cases pending before her that might affect the proceeding's fairness, *id.* Canon 3(B)(9); that she disassociate herself from "membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin," *id.* Canon 2(C); and that, when a candidate for judicial office, she shall not make speeches addressing political or legal issues that are likely to come before the court, *id.* Canon 5(A)(3)(d). Some judges argue that the latter is an overly broad restriction on their first amendment rights. London, *For Want of Recognition, Chief Justice is Ousted,* N.Y. Times, Sept. 28, 1990, at B16, col. 3. I have searched in vain for cases addressing the judge's protected right to freedom of expression. Nonetheless, one ought not dismiss out of hand any suggestion that the judge, even within her instititutional role, has certain first amendment rights. *Cf.* United States v. City of Yonkers, 856 F.2d 444, 457 (2d Cir. 1988), *rev'd on other grounds sub nom.,* Spallone v. United States, 110 S. Ct. 625 (1990) (acknowledging, yet rejecting, first amendment claims of city councilmen asserted as defense to contempt citation issued for their refusal to comply with court decree).

113. Regardless of whether the recipient consents to join the litigation, he is in a more advantageous position having received a presumably accurate, non-coercive, and informational communication than he otherwise would be.

114. *See supra* note 92 and accompanying text.

115. Because no branch of government has explicitly prohibited notice, this case is easily distinguished from Snepp v. United States, 444 U.S. 507 (1980), which upheld the CIA's agreement with Snepp requiring him to submit any proposed publications for prior review. *Id.* at 509 n.3. I take no position here on whether Congress or the Court could, consistent with the first amendment, prohibit courts from notifying putative plaintiffs, other than to note that it is a legitimate question. *See, e.g.,* Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 598, 603–05 (1982) (striking down Massachusetts statute requiring closing of courtroom to public or press during testimony of minor sexual offense victim, holding that first amendment embraces a right of access to criminal trials to ensure informed discussion of governmental affairs).

116. *See supra* text accompanying notes 91–93.

extraordinary is the resistance of the bench and bar to the notion that notice lies within the court's inherent power.

Furthermore, given that plaintiffs and their attorneys have first amendment rights to solicit consent from potential plaintiffs, it is preferable for the court to maintain some control over the process, whether the notice goes out under plaintiffs' or counsel's signature as approved by the court, or whether the court itself sends the notice. The court can diminish lingering concerns about attorney overzealousness and misrepresentation, and can neutralize any tendency of the notice to suggest some judgment on the merits of the lawsuit.[117] The court can further insure that the recipient of the notice is aware of the option to employ counsel of his or her own choice.[118]

To be sure, the court's desire to notify putative plaintiffs may not be entirely neutral. For reasons of efficiency and finality the court may

117. *See, e.g.,* Allen v. Marshall Field & Co., 93 F.R.D. 438, 442 (N.D. Ill. 1982) (judicially supervised notice assures neutral discussion of the action and potential plaintiffs' rights of participation).

118. In Sperling v. Hoffman-LaRoche, Inc., 118 F.R.D. 392, 416 (D.N.J. 1988), *aff'd,* 862 F.2d 439 (3d Cir. 1988), *aff'd,* 110 S. Ct. 482 (1989), the notice authorized by the trial court contained the following:

> "YOUR LEGAL REPRESENTATION IF YOU JOIN. If you choose to join this suit, your interest will be represented by the named plaintiffs through their attorneys, as counsel for the class."

The notion that recipients of such notice must either accept named plaintiffs' counsel, or forego the opportunity to join the lawsuit is troubling, and other courts allowing notice have made clear that recipients may employ counsel of their choice. See, e.g., the notice approved by the court in *Allen,* 93 F.R.D. at 447 app. A:

> Your Options As To Legal Representation If You Join The Suit. If you wish to join the suit as a party plaintiff, it is entirely your own decision as to whether you prefer to be represented by the present plaintiffs' attorneys or by an attorney of your own choosing.

Accord, Johnson v. American Airlines, Inc., 531 F. Supp. 957, 961, 966 (N.D. Tex. 1982).

Rule 23(c)(2) expressly provides that the notice sent to absent class members in a (b)(3) action must apprise them that they have the right to appear through counsel of their own choice. FED. R. CIV. P. 23(c)(2) ("[A]ny member who does not request exclusion may, if he desires, enter an appearance through his counsel."). There is some question as to the scope of such an appearance, however. *See* Kaplan, *supra* note 61, at 392 n.137:

> I read this "appearance" as entitling counsel to receive the papers in the action to enable him to follow the case with a view to deciding, *e.g.,* whether he should move to intervene. If "appearance" is read as enabling the class member to be admitted automatically into the action as a party, it would stand in odd contrast to intervention in the action under Rule 24, which is not automatic and requires a showing .... Until experience accumulates, it may be advisable to set out in the (c)(2) notice to the class the rights which the court proposes to allow to "appearing" members.

Neither the Court of Appeals nor the Supreme Court addressed the specifics of the notice authorized in *Sperling.* Both passed only on the authority of the trial court to issue notice at all. Hoffman-La Roche, Inc. v. Sperling, 110 S. Ct. 482, 486 (1989). Given that a principal concern regarding notice is the pecuniary motivation of plaintiffs' counsel, any notice should apprise recipients that they are free to employ the named plaintiffs' counsel, or counsel of their own choosing.

hope that those notified will join in the existing litigation, instead of bringing separate lawsuits against the defendant at other times.[119] Thus a judicial tendency to be overbearing is a potential risk. Yet even balancing between speech and other legitimate competing interests,[120] the balance weighs in favor of allowing judicial notification. Because notice would be subject to adversarial probing, and perhaps to further review,[121] sufficient redress would exist for any impropriety.[122]

VII. NOTIFICATION, ADVERSARIAL JUSTICE, AND PUBLIC POLICY

Resistance to judicial notice to putative plaintiffs rests primarily on a belief that allowing the judge to intervene or interfere in this way is inconsistent with the rules of adversarial justice.[123] The litigation game as traditionally played requires that each opponent try to outfox the other, with the judge impartially refraining from helping or hindering either side's chances of success. If the judge helps plaintiffs to notify other persons who might join in, that would increase plaintiffs' chances either of winning a verdict after trial or extracting a more favorable settlement. Thus the judge would be helping plaintiffs and hurting defendants, and, it is argued, that is not how the game is played.

Another aspect of the game is who gets to play in the first place. Potential players must determine they have a cause of action against the defendant, and must take appropriate action before the statute of

119. *See* M. PETERSON & M. SELVIN, MASS JUSTICE: THE LIMITED AND UNLIMITED POWER OF COURTS 5 (Yale Law School Program in Civil Liability Working Paper No. 123, 1990) ("Faced with mass tort litigation, judges are not simply neutral arbiters but rather they have strong incentives of their own to speed the judicial process, save costs and labor, and reduce the redundancy of mass litigation.") (on file with the *Washington Law Review*) (forthcoming in 54 LAW & CONTEMP. PROBS. __ (1991)).

120. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 638 (1985).

121. Interlocutory review might be available under 28 U.S.C. § 1292(b), as in *Sperling*, 110 S. Ct. at 485–86, or review might be had by mandamus, as in Pan Am. World Airways v. United States Dist. Court, 523 F.2d 1073, 1076–77 (9th Cir. 1975). *But see* Resnik, *supra* note 80, at 413–14 (arguing that pre-trial management is significantly more problematic than post-trial management because of infrequency of appellate oversight).

122. In addition, violations of applicable standards of judicial conduct might form the basis for sanctions. The Model Code of Judicial Conduct Canon 2(A) (1990) provides that "[a] judge shall . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."

123. *See* Pound, *supra* note 10, at 281–82 ("The idea of [our contentious] procedure . . . leads the most conscientious judge to feel that he is merely to decide the contest, as counsel present it, according to the rules of the game, not to search independently for truth and justice."). My discussion of the adversary system in this part pertains to its operation only in civil, not criminal litigation.

limitations expires. If the statute runs before plaintiff acts, defendant wins by default. The traditional rules appear to prevent the judge—the impartial referee—from assisting potential plaintiffs in discovering the existence of a possible cause of action.[124] Or, to put it as others have, courts should not be in the business of waking sleeping plaintiffs.[125]

The game need not and should not be played that way. The posture of the judge as passive and neutral may be legitimate when competitors are comparably well-matched and resources ample on both sides. Truth and justice might prevail if able adversaries are allowed to compete, relatively unhampered. But generalized assumptions about equality between adversaries or comparability of resources do not withstand scrutiny.[126] We cannot assume that those with legitimate claims will necessarily know when and how to invoke the judicial machinery. Many persons who would "sleep through" the statute of

124. The 1966 amendments to Rule 23 altered the rules concerning this aspect of the game to the extent that if an action is certified as a class action, then the judge has the explicit power to notify absent class members in the interests of justice. *See supra* note 16 and accompanying text.

125. *See* Roshto v. Chrysler Corp., 67 F.R.D. 28, 30 (E.D. La. 1975):

> The awakening of sleeping plaintiffs by either the plaintiff or the Court would fly in the teeth of the centuries-old doctrine against the solicitation of claims. While we sympathize with the plight of the unascertained number of potential plaintiffs who may be entirely unaware of their legal rights, we must not put our imprimatur on a procedure designed to stir up litigation. This statement is made only because we are unaware of any legal precedent or principle which supports the suggestion that either the plaintiff or the Court has any moral, legal or ethical duty "to act as unsolicited champions of others."

See Cherner v. Transitron Elec. Corp., 201 F. Supp. 934, 936 (D. Mass. 1962) (disallowing notice in pre-1983 Rule 23 spurious class action as it was not court's "duty to awaken anyone who is sleeping through the period of limitation set by Congress"); *see also Sperling,* 110 S. Ct. at 492 (Scalia, J., dissenting) (citations omitted):

> There is more than a little historical irony in the Court's decision today. "Stirring up litigation" was once exclusively the occupation of disreputable lawyers, roundly condemned by this and all American Courts. . . . But in the age of the "case managing" judicial bureaucracy, our perceptions have changed. Seeking out and notifying sleeping potential plaintiffs yields such economies of scale that what was once demeaned as a drain on judicial resources is now praised as a cutting-edge tool of efficient judicial administration. Perhaps it is. But that does not justify our taking it in hand when Congress has not authorized it. Even less does it justify our rush to abandon (not only without compulsion but without invitation) what the Court deprecatingly calls the courts' "passive" role in determining which claims come before them, but which I regard as one of the natural components of a system in which courts are not inquisitors of justice but arbiters of adversarial claims.

126. *See* Burbank, *The Transformation of American Civil Procedure: The Example of Rule 11,* 137 U. PA. L. REV. 1925, 1952 (1989) (noting that pure adversary system requires equality of representation, and that we have in this country no equal access to quality legal representation); Sward, *Values, Ideology, and the Evolution of the Adversary System,* 64 IND. L.J. 301, 312 (1989) (noting that adversary theory ignores inequality in resources or skill).

limitations absent notice, may do so through ignorance, lack of resources, or both.[127]

There is scant justification for keeping potential plaintiffs in the dark.[128] Notice fosters informed decisionmaking. At the core of our fundamental democratic values, exemplified by the first amendment, is open communication and shared information. Allowing, perhaps even encouraging, the judiciary to facilitate notice to interested persons furthers these fundamental values.

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127. *See* Riojas v. Seal Produce, Inc., 82 F.R.D. 613, 619 (1979):

> In light of the fact that the [FLSA] is meant to aid injured parties in recovering unpaid minimum wages, it is only sensible that procedures facilitating this intent would be favored. This is particularly so in the present case in which there are possibly hundreds of migrant farm workers who might not ever receive their allegedly unpaid minimum wages. These farm workers are relatively poor individuals who have received little formal education and often have no conception of legal rights which they might possess. . . . In a case such as this where the alleged class members are migratory and difficult to locate, it is nothing more than an act of fundamental fairness to allow [notice] . . . .

Accord Neizil v. Williams, 96 Lab. Cas. (CCH) ¶¶ 34, 328 (M.D. Fla. 1983); *see also* J. AUERBACH, *supra* note 99, at 43 (describing how professional canons prohibiting solicitation and advertising penalized less sophisticated potential clients).

In addition to the problem that those who are uninformed and unsophisticated might fail to act on their claims in a timely manner, is the very real concern that such people might be persuaded to settle for far less than they could otherwise recover. *See, e.g.*, G. STERN, THE BUFFALO CREEK DISASTER 21–22 (1976) (describing mining company's attempts to persuade victims of mining disaster to settle without consulting counsel).

128. It is unlikely that judicially-facilitated notice will result in any glut of litigation, tort or otherwise, in federal courts that would otherwise be resolved by the state courts. *See* Galanter, *The Life and Times of the Big Six; or, The Federal Courts Since the Good Old Days*, 1988 WIS. L. REV. 921. Galanter demonstrates that federal tort filings have shown marginal growth when compared to other kinds of filings since 1960. *Id.* at 925. They represented 16.5% less of the total civil filings in 1986 than in 1960. *Id.* at 936. In addition, the most significant mass of tort filings in federal court are product liability cases. By 1985, product liability filings represented 31.5% of all tort filings. *Id.* at 937. The increase in product liability filings was 30 times that of other tort filings from 1974 to 1985 (1579 to 13,554 as compared to 22,551 to 28,296). *Id.* Product liability cases make up a much greater proportion of the tort docket in federal court than in state court. For example, in Florida in 1986, product liability cases were 2.3% of all tort filings in the state, compared to 29.7% of the federal tort filings. *Id.* at 938. Furthermore, episodic toxic torts comprise a large percentage of the product liability cases. In 1986, for example, asbestos cases comprised 43% of all product liability cases in federal court. *Id.* at 939. As Galanter suggests, "[t]his pool is destined to diminish over the coming decades—due first to the deadly effects of asbestos and second to powerful preventive effects produced by the asbestos litigation." *Id.* at 939–40. Thus a substantial bulk of federal tort cases currently are of mass tort nature. Despite general displeasure with diversity jurisdiction, federal courts manifest little or no antipathy to assertions of jurisdiction over mass torts. *See* J. Resnik, *supra* note 18, at 105–06. As Professor Resnik asserts, "it seems 'unnatural' to think about not using the federal courts as the place for mass tort litigation." *Id.* at 111. Whatever increase in federal litigation judicial facilitation of notice might cause would likely be more than offset by the total cost savings in combined state and federal litigation.

We should improve upon our adversary system for the sake of public, as well as private, interests.[129] The greater the number of affected parties, the greater the potential public interest in what might otherwise be deemed a private matter. For example, the creation of statutory causes of action for age discrimination in employment claims bespeaks a public interest in eradicating discrimination based on age.[130] Concern for social justice supports the legitimacy of assisting those who may be unaware of their constitutional and statutory rights.[131] The medical, economic, and social costs of mass exposure to substances such as asbestos create a public interest in the collective pursuit of tort claims brought against manufacturers of these substances.[132] Air safety is another example of a public interest that can be promoted by resolving private claims arising from airplane disasters. The story of the aftermath of the 1972 coal mining disaster in Buffalo Creek, West Virginia, underscores the value of private, mass joinder litigation in publicizing and rectifying egregious environmental and occupational safety violations.[133]

Increasingly, to ease case management, courts are certifying claims arising from mass torts as Rule 23 class actions.[134] Rule 23 provides for notice in class actions arising under it.[135] The Supreme Court has held that for the purposes of opt-in class actions arising under the FLSA and the ADEA, courts have the right to authorize notice to

129. *See* Rubin, *The Managed Calendar: Some Pragmatic Suggestions About Achieving the Just, Speedy, and Inexpensive Determination of Civil Cases in Federal Courts*, 4 JUST. SYS. J. 135, 136, 140 (1978) (judge is representative of the public interest in matters of judicial system utilization); Yamamoto, *supra* note 1, at 401 (asserting protection of public rights as function of adjudication).

130. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (1988) (as amended).

131. *Cf.* Kaplan, *supra* note 61, at 397–98 (arguing for opt-out, as opposed to opt-in class provisions, since many recipients of notice "for one reason or another, ignorance, timidity, unfamiliarity with business or legal matters, will simply not take the affirmative step. The moral justification for treating such people as null quantities is questionable").

132. *See* Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 900 n.186 (1984) ("Court-ordered notification of potential victims not only would permit aggregation of claims, but also would reduce the overall cost of accidents by enabling victims to receive diagnosis and treatment at an earlier stage of the disease caused by their exposure.").

133. *See generally* G. STERN, *supra* note 127.

134. *See* J. Resnik, *supra* note 18, at 84:

> When faced with mass torts, some judicial hostility to class actions melts, as the class action becomes perceived more as a management tool than as a vehicle for political empowerment . . . . [T]he class action can be viewed and used less as a means of access than as a way to conserve judicial resources in response to the existence of many lawsuits making similar claims.

135. *See supra* notes 16–17 and accompanying text.

potential class members.[136] The distinctions between mass joinders and class actions have begun to blur.[137] There is no legitimate reason for treating these two categories of complex litigation differently for purposes of the court's power to send notice.

To the extent that defendants may have limited resources to pay claims against them, there is a public interest in insuring that the vindication of private rights do not depend on the serendipity of who is able to perfect a judgement first against a defendant.[138] Consolidation of claims would assuage these concerns, through resolution of multiple claims against a defendant arising from a single act or series of related acts.

Furthermore, litigation is a substantial drain on public as well as private resources.[139] At a time when we face an enormous national budget deficit, we ought to embrace measures that conserve public resources wherever feasible.[140] Consolidation is a cost effective tool for resolving multiple claims.

Notification would facilitate consolidation. Admittedly, it would not guarantee consolidation, and thus is only a partial solution to the problems raised. I refrain from advocating a more radical approach of requiring potential plaintiffs to participate in pending litigation or risk

136. *See supra* notes 42–52 and accompanying text.

137. *See* J. Resnik, *supra* note 18, at 98–104.

138. This is the rationale supporting the "limited fund" class action. *See* Trangsrund, *Joinder Alternatives in Mass Tort Litigation,* 70 CORNELL L. REV. 779, 784 (1985) (arguing that "limited fund class action is appropriate only when the prosecution of separate tort claims creates a significant risk that damage recoveries by some individual plaintiffs will 'substantially impair or impede' the ability of others to secure collectable judgments."); FED. R. CIV. P. 23 advisory committee's notes (1966) (judgment in limited fund class action does not preclude claims of nonappearing members).

139. *See* Miller, *supra* note 76, at 22 (describing consumption of public resources by dilatory litigation tactics).

140. Certainly this was a motivating factor in the 1983 amendments to the federal Rules. *See, e.g., id.* at 29–30:

> [Rules 16 and 26] represent an explicit wrench or departure from the traditional adversary model—the historic notion that cases ought to be handled by attorneys for their clients as they think best, at whatever speed, using whatever procedures, settling or not settling as they see best. But what rules 16 and 26 do formally is not a tremendous wrench with actual practice; it is simply a formalization of a process of moving from a pure adversary theory of litigation to a shared power relationship between counsel and the bench. The bench now, in a sense, representing the public, is saying you are invoking a public resource. Society has the right to participate in the decision-making process as to how this case is to be handled. It is no longer true that cases are lawyers' cases. There is a triangulated relationship here. Now that may—over time, through attrition and just change in the nature of the bench and in the nature of the bar—represent a very dramatic shift from what we have for a thousand years called the adversary model. I don't know whether that is good; I don't know whether it is bad; all I know is that it is potentially a very high stakes poker game.

forfeiting their claims.[141] Notifying persons of pending litigation merely provides an opportunity for the resolution of all disputes arising from a given set of events. It does not guarantee success. Some may choose to bring their claims in other courts, at other times. Others who might have slept on their claims until the passage of the statute of limitations, and now awake to their rights, may bring suit in another court.[142] Nonetheless, joinder offers so many advantages to

141. Presently, 28 U.S.C. § 1407(a) (1988), permits the trial court to consolidate proceedings filed in federal court, but only for purposes of pretrial proceedings. Recent recommendations of the Federal Courts Study Committee would have Congress amend § 1407(a) to require consolidation also for trial, and provide for minimum diversity. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, April 2, 1990, at 44–45; *see also* H.R. 3406, 101st Cong., 1st Sess. § 4(i)(1), 135 CONG. REC. 6659 (1989) (related to H.R. 4807, 100th Cong., 2d Sess., 134 CONG. REC. H4232 (1988)) (the Multiparty, Multiforum Jurisdiction Act of 1989, permitting transferee courts to retain jurisdiction through liability phase of trial of mass tort cases transferred under the Act). *But see* Trangsrund, *supra* note 138, at 816–24 (opposing mandatory consolidation of mass tort cases).

The American Law Institute (ALI) *Complex Litigation Project* has put forth a more radical approach. *See* COMPLEX LITIGATION PROJECT § 5.05 (Tent. Draft No. 2, 1990). It proposes a statute that would empower a court to notify nonparties who may have a claim "involv[ing] one or more questions of law or fact in common with the actions pending before the transferee court and aris[ing] out of the same transaction, occurrence, or series of transactions or occurrences" that they may intervene in an action pending before the court and that whether or not they intervene, they "will be bound by the determinations made to the same extent as a party to that action." *Id.* at 97. Considerations include whether "[i]ntervention will advance the efficient, consistent, and final resolution of asserted and unasserted claims; and . . . will not impose upon either the nonparties or existing parties undue prejudice, burden, or inconvenience. The effect of this proposal would be to increase the advantages of mandatory consolidation by affording issue-preclusive effect to the determination of the transferee forum not only as to existing litigants, but to potential litigants with mature yet unfiled claims. Chapter 5 of Tentative Draft No. 2 was approved provisionally at the ALI Annual Meeting in May, 1990, subject to reexamination in relationship to other Project chapters yet to be drafted. 12 ALI REP. 3 (1990).

The ABA Comm'n on Mass Torts, Revised Final Report and Recommendations (Nov. 1989) takes yet another approach. It would discourage "fence-sitting" on fully matured yet unfiled claims by limiting punitive damages and precluding use of the judgment obtained in the consolidated litigation for plaintiff's advantage. *Id.* §§ 110, 112(a). This latter provision is largely a codification of the *Parklane* rule regarding offensive collateral estoppel. *See supra* note 87. The provision would *not* apply if plaintiff had no timely notice of the consolidated litigation, and the Commission's proposed legislation is silent on whether the trial court can notify persons having matured yet unfiled claims. ABA Comm'n on Mass Torts, *supra*, § 112(b)(1).

142. This is, however, unlikely to be a significant problem. Those sophisticated enough to choose another forum would likely have brought suit elsewhere in any event. Such notice then is unlikely to result in an increase in satellite litigation, and is probably more likely to effectuate greater consolidation. *See* Johnson v. American Airlines 531 F. Supp. 957, 960 n.1 (N.D. Tex. 1982):

> Assuming American is correct in its assertion that the Plaintiffs herein are well educated flight officers, and hence by their status are more likely to be aware of their legal rights and opportunities to litigate under the ADEA, then the fear of multiple lawsuits becomes all the more real and compelling.

potential plaintiffs that the possibility of a single forum for resolution of all aspects of a single wrong is greatly enhanced.[143]

It is important to acknowledge that the statute of limitations serves important functions and is not merely a ploy in the adversary game.[144] The statute fosters repose. It provides the security of knowing that after the passage of a given time, we no longer need fear that a particular legal problem will haunt us. Individuals and institutions alike are entitled to the certainty of some statutory period so that they may go about their affairs with reasonable predictability. Furthermore, stale claims invite stale proof.

Yet it is primarily the gamesmanship aspect of the statute of limitations that is likely to be lost if judges are empowered to notify putative plaintiffs. The statute of limitations will no longer be a period defendant must endure, after which it will be safe from suit. If other plaintiffs choose to opt-in to the pending litigation, their claims should relate back to the original filing.[145] The legitimate justifications for the statute will be preserved: the initial suit will apprise defendants of the

143. *See* Allen v. Marshall Field & Co., 93 F.R.D. 438, 444 (N.D. Ill. 1982) (authorizing notice to potential plaintiffs in ADEA opt-in class action):

> Moreover, it is already apparent that a number of other present and former employees are contemplating filing separate actions. In the interests of judicial economy and efficiency, it is desirable to minimize the number of such separate actions and to coordinate the discovery, at least on the issue of liability. Notice of this action should contribute substantially to that end.

144. *See supra* text accompanying note 124.

145. This would be subject to any statute of limitations problem or other bar that would have prevented the opting-in party from pursuing his claim when the original complaint was filed. *See, e.g., Johnson,* 531 F. Supp. at 963 (holding that only persons who would have been able to timely satisfy ADEA filing requirements as of date named plaintiff filed charge could opt-in to class). This approach is consistent with the treatment of the filing requirement in Title VII class actions, *see, e.g.,* Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969); Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 499 (5th Cir. 1968), as well as with the thrust of FED. R. CIV. P. 15(c) regarding relation back of amendments to the pleadings. *See* FED. R. CIV. P. 15 advisory committee notes:

> The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs.

See also United States v. Cook, 795 F.2d 987, 994 (Fed. Cir. 1986) (upholding discovery of names of putative plaintiffs and refusing to address statute of limitations defense regarding such persons in absence of specific case or controversy).

In order to insure that the defendant not be unfairly surprised, the complaint, presumably filed within the statute of limitations should allege its class or collective nature. *Cf.* Lusardi v. Lechner, 855 F.2d 1062, 1078 (3d Cir. 1988); Kloos v. Carter-Day Co., 799 F.2d 397, 400 (8th Cir. 1986); Mistretta v. Sandia Corp., 639 F.2d 588, 593–94 (10th Cir. 1980); Bean v. Crocker Nat'l Bank, 600 F.2d 754, 759–60 (9th Cir. 1979) (prerequisite of filing with EEOC within 180 or 300 days of filing suit for discriminatory act satisfied if one claimant filed within statutory period on behalf of himself and all others similarly situated). *But cf.* McCorstin v. United States Steel

nature of the claims against them, and there will be little risk that necessary evidence will become stale or witnesses more difficult to locate.[146]

A number of other issues remain. If judges are given the power to facilitate notice to putative plaintiffs of pending litigation, what range of discretion should they have? Should it be within the judge's discretion to send the notice on court letterhead, or to authorize plaintiffs' counsel to send it?[147] Who should bear the cost of notice?[148] Should the potential benefit to plaintiffs' counsel weigh in the balance?[149] How much discretion should the court have to refuse to issue notice to or allow discovery of potential plaintiffs?[150] Should the answer to any of

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Corp., 621 F.2d 749, 755–56 (5th Cir. 1980) (plaintiff precluded from proceeding as an ADEA class action when other employees did not file timely charge themselves).

146. In Sprogis v. United Air Lines, 444 F.2d 1194 (7th Cir.), *cert. denied,* 404 U.S. 991 (1971), the court of appeals upheld the trial court's post-judgment notice to persons who were similarly situated to the plaintiff airline stewardesses. *Id.* at 1201. Although the court had never certified the case as a class action, it found that the sex discrimination violation of Title VII was of a class nature. *Id.* at 1201–02. By inviting putative class members to submit claims for resolution in the remedy phase of the suit, the court ignored any statute of limitations problems. *See also* Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589 (10th Cir. 1961), *cert. dismissed,* 371 U.S. 801 (1962) (allowing absent plaintiffs to submit claims for damages after interlocutory finding of defendants' liability). Given that a defendant may litigate a lawsuit with less vigor if it were not originally tried as a class action, such an order would likely have a far greater adverse impact on a defendant than notification to putative plaintiffs pre-trial is likely to have.

147. *See* Woods v. New York Life Ins. Co., 686 F.2d 578, 582 (7th Cir. 1982) (Eschbach, J., concurring and dissenting).

148. *See* MCL, *supra* note 13, § 1.45. In Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 176 (1974), the Court required plaintiffs to bear the costs in the first instance, subject to recovery should they prevail. Several federal district courts have adopted the *Eisen* rule, *see, e.g.,* D. KAN. R. 209(d); M.D.N.C.R. 212(d). Interestingly, neither counsel, nor any of the courts adjudicating the *Sperling* notice issue, addressed the question of costs.

149. *See* Shapero v. Kentucky Bar Ass'n, 486 U.S. 466, 486 (1988) (O'Connor, J., dissenting) (arguing that given pecuniary motive of attorney in mailing solicitations to persons known to have specific legal problems, the tendency towards corruption that ensues substantiates overriding governmental interest in prohibition). In *Sperling,* petitioner argued that the interest of plaintiffs' lawyers in notifying putative plaintiffs was "the maximization of money damage claims as leverage for extracting favorable settlements and to maximize the potential counsel fee award." Brief for Petitioner at 15, Hoffman-La Roche v. Sperling, 110 S. Ct. 482 (1989) (No. 88-1203). The Court did not address this issue.

150. In particular cases, joinder of putative plaintiffs might be inappropriate. *See* FCSC Report, *supra* note 14, at 45 ("Consolidation . . . is not always desirable. It may not be economical, and trial on liability issues alone may skew results. Thus, while it is important to make consolidation possible for cases in which it could be desirable, guidelines for its use could reduce its misapplication when consolidation might be inappropriate.") The Committee recommended that such guidelines be published either by the Board of Editors of the *MCL,* or as part of the Federal Rules of Civil Procedure. *Id.*

these questions depend on the preferences of parties or their attorneys?[151]

Because notice furthers information, access, and efficiency, the court should bear a heavy burden to justify a decision not to facilitate notice when requested by either party to do so. In general, the cost of notice should be born by the party who desires to send it. Costs of discovery of the names and addresses of potential parties should be born as they would be for other discovery. If plaintiff desires to send notice, plaintiff should bear the costs of printing and mailing.[152] If the cost of individual notice would be prohibitive, then plaintiff should consider feasible alternatives, such as notice by publication, or public posting.[153]

If it is the court rather than either party that desires to send notice, the court should consider infringements on party autonomy and fairness. If the court concludes that the public benefits of notice outweigh the private burdens on the existing parties, then it would be appropriate for the court to bear the cost of notice.[154]

Undoubtedly, other questions about notice will arise. Our judicial system is moving appropriately towards decreasing transactional costs of litigation through consolidation of appropriate cases and enhancement of managerial techniques.[155] A commitment in principle to the propriety of judicially facilitated notice furthers that trend.[156] Experience will help address the secondary questions notice raises.

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151. *See In re* Air Crash Disaster 549 F.2d 1006, 1013–14 (5th Cir. 1977) (court may consolidate cases and designate lead counsel over parties' or their counsel's objections).

152. *See Eisen,* 417 U.S. at 178 ("The usual rule is that a plaintiff must initially bear the cost of notice to the class.").

153. For the kind of mass joinder actions this article addresses, there are no Rule 23 or due process requirements for "best notice practicable" as there was in *Eisen. See supra* text accompanying notes 83–88. If the number of affected persons would be prohibitively large, such as in the asbestos litigation, then the "joinder of all members is [likely] impracticable." FED. R. CIV. P. 23(a)(1).

154. Certainly, plaintiff should not be saddled with costs to expand the litigation. It is clear from *Eisen,* 417 U.S. at 177–79, that the Court would find it inappropriate to require defendant to undertake these expenses, at least before any finding of liability. If the trial court concludes that fostering consolidation through notice is likely to conserve judicial resources, then it is appropriate for the judicial system to absorb the costs.

155. *See supra* notes 12–15, 76–81 and accompanying text.

156. While I believe the Supreme Court will reach the same conclusion when faced with the appropriate vehicle—be it case specific, or as an amendment to the Federal Rules of Civil Procedure—I would certainly welcome congressional expedition. For example, the Multiparty, Multiforum Jurisdiction Act of 1990, H.R. 3406, 101st Cong., 1st Sess, 135 CONG. REC. H6659, passed the House on June 1, 1990, but failed to gain Senate approval. This Bill provided that "any person with a claim arising from the event or occurrence described in subsection (a) shall be permitted to intervene as a party plaintiff in the action," *id.* § 1367(c), but it was silent on the

VIII. CONCLUSION

In *Hoffmann-La Roche v. Sperling,* the Supreme Court allowed the umpire to notify some sleeping players that the game was under way. It made good sense for the Court to do so. Although due process does not require that persons potentially interested in complex litigation other than Rule 23 class actions receive such notice, notice fosters important public policy interests and is suggested and legitimated by first amendment values. The Article III judge does not overstep constitutional bounds by apprising such persons that litigation they might want to join is proceeding. Not only is such power consistent with the evolving tools of judicial management of litigation, the absence of such power in complex litigation undermines efforts to improve the efficacy, efficiency and accessibility of the judicial system. It is time to put old saws about champertous lawyers and sleeping plaintiffs to rest.

question of notice to such persons. This legislation would be an appropriate vehicle for explicating the courts' power to notify interested persons of complex litigation.